No. 76-1684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

SUPER TIRE ENGINEERING CO., SUPERCAP CORPORATION AND A. ROBERT SCHAEVITZ, *Petitioners,*

v.

LLOYD W. MCCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY, ET AL.,

and

TEAMSTERS LOCAL UNION NO. 676, a/w INT'L BHD. OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents.*

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

In his Brief in Opposition, Respondent Lloyd W. McCorkle misconceives the Court's ruling in *Richard A. Batterton, etc.* v. *Robert Francis, etc.*, —— U.S. ——, (No. 75-1181) (June 20, 1977), ignores the affirmative burden of benefit entitlement imposed upon all

welfare claimants under the Aid For Dependent Children (AFDC) program by the Court in *Burns* v. *Alcala*, 420 U.S. 575 (1975), and misinterprets Congressional intent in enacting and amending both the AFDC and Aid For Dependent Children-Unemployed Father (AFDC-UF) programs.

These contentions require response so that the Court can consider the proper statutory, legislative, and decisional framework which render the issues presented in this case so important to federal welfare and labor policy.

ARGUMENT

1. THE COURT'S RULING IN *BATTERTON* v. *FRANCIS* DID NOT REACH ANY ISSUE POSED IN THE INSTANT CASE

Respondent Lloyd McCorkle contends (Br. 10-11) that *Batterton* v. *Francis* interpreted the meaning of the term "unemployment" in § 607(a) of the Social Security Act, and thus there is no need to review "any further question which may exist as to the meaning of 42 U.S.C. § 607(a)." McCorkle also contends that no other "substantial federal question" now exists with respect to the impact of state authorized payments of federal and state welfare payments to employees on strike because the Court in *Batterton* v. *Francis* "looked solely to the provisions of the Social Security Act" in rendering the decision. These conclusionary contentions are advanced without any analysis of or even references to this recent decision. In fact the Court in *Batterton* v. *Francis* dealt with one narrow, limited issue which does not affect the broader policy questions raised by the instant petition.

In *Batterton* v. *Francis*, one striking employee on behalf of all similar situated striking employees challenged eligibility regulations issued by the State of Maryland which denied AFDC-UF welfare benefits to all claimants who were ineligible for unemployment compensation under Maryland's Unemployment Insurance Law. This statute disqualified all claimants who engaged in a strike against their employer during a labor dispute. Section 6 Md. Ann. Code art. 95A (1969 Repl. Vol.). The State of Maryland defended its double disqualification on the grounds that amended regulation issued by the Secretary for HEW authorized such a disqualification. The sole issue presented in *Batterton* v. *Francis* was "whether the regulation is a proper exercise of the Secretary's statutory authority." (sl.op. p. 1). Or as Mr. Justice Blackmun also stated (sl.op. p. 8): "Thus, the actual issue we must decide is not how the statutory term ["unemployment"] should be interpreted, but whether the Secretary's regulation is proper."

In upholding the Secretary's regulation against the contention of Mr. Francis that benefit eligibility was required for any person who actually worked less than a minimum "hours-worked" standard, the Court held that "unemployment" could also be properly defined with respect to *why* a person is out of work, and that because Congress had left to the states some discretion to define unemployment, the Secretary could broadly prescribe standards which recognized "some local options."

The Court did *not* consider whether striking employees should be treated as "unemployed" under the Social Security Act because Maryland "incorporated its labor dispute rule as a disqualification for unemployment compensation" (sl.op. p. 13 n. 16) Thus, the Court noted that that part of the Secretary's regula-

tion which permits participating states to exclude (or include) striking employees from AFDC-UF benefits "is not directly at issue in this case" *Id.* Therefore, there was no warrant for the Court to consider whether this option was consistent with federal welfare policy. It is precisely this question—i.e. whether Congress intended participating states to confer welfare payments from either federal or wholly state created funds to employees on strike—which is presented in the instant petition. The Court did indicate, however, in agreement with the position advanced by Super Tire in the courts below and before this Court in the instant Petition for Certiorari, that (sl.op. p. 12):

> Exclusion of individuals who are out of work as a result of their own conduct and thus disqualified from state unemployment compensation is consistent with the goal of AFDC-UF, namely, to aid the families of the involuntarily unemployed."[14]

[14] In describing the bill on the floor of the House, a cosponsor stated that the concern was with the "involuntarily unemployed and I put the emphasis on the word 'involuntarily'." 107 Cong. Rec. 3767 (1961) (Remarks of Cong. Byrnes).

Similarly, because the State of Maryland *disqualified* striking employees from AFDC-UF benefits, there was no warrant or occasion for the Court to consider or reach the other important question posed in the instant petition—i.e., whether the *granting* of such benefits under this and other federal (AFDC) and state (New Jersey Public Assistance Law) (NJSA 44:8-107 *et seq.*) (New Jersey Assistance to Families of the Working Poor Law) (NJSA 44:13 *et seq.*) programs impinges upon or conflicts with the principle of free collective bargaining embodied in federal labor policy. This issue is squarely posed here, for in remanding the

case for disposition on the merits, the Court recognized in *Super Tire Eng'r Co.* v. *McCorkle,* 416 U.S. 115, 124 (1974):

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective bargaining agreement, and is a factor lurking in the background of every incipient labor contract.

and then stated (416 U.S. at 124):

> The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes.

Super Tire contends here that while federal labor stautes may not *explicitly* preclude strikers from receiving welfare benefits, it is clear that Congress has *implicitly* "ruled out such assistance" as inconsistent with federal welfare *and* labor policy.

In sum, then it is readily apparent that the Court has not yet addressed the significant questions now presented to the Court, and the relevance of *Batterton* v. *Francis* to these issues is only that the Court has recognized, as noted above, that the cooperative federal-state AFDC program (of which AFDC-UF is a part) was intended by Congress to benefit only those families with dependent children where the father is involuntarily out of work. Because employees on strike retain their jobs by express statutory language in Section 2(3) of the National Labor Relations Act and thus are not actually out of work, and because their refusal to work is not a result of economic forces beyond their control, it can not plausibly be maintained

that Congress has authorized in either the Social Security or National Labor Relations Act optional or mandatory welfare eligibility for employees who elect to strike their employer to compel acceptance of their collective bargaining demands.

Finally, Lloyd McCorkle contends (Br. 10-11) that the instant petition is inappropriate to review the fundamental question of strikers' eligibility for AFDC-UF benefits because New Jersey withdrew from this program after certain Super Tire employees obtained benefits under this program, and "neither the District Court nor the Court of Appeals addressed themselves to the meaning of 42 U.S.C. § 607(a)." In fact, however, the District Court did construe this statutory provision in light of legislative history and concluded (412 F.Supp. 192, at 196-97): "Neither the language of the [1968] amendment [to the AFDC-UF program] nor its legislative history indicate a congressional intent to define unemployment as excluding those out of work due to a labor dispute." The Court of Appeals declined to rule on this question only because it believed New Jersey's withdrawal from the program mooted Super Tire's appeal. 550 F.2d at 908-09. This issue is not moot because New Jersey has now opted to participate in this program effective July 1, 1977. As the Brief in Opposition candidly notes (Br. 4 **): "After the Third Circuit issued its decision, the New Jersey Legislature enacted legislation to restore New Jersey's participation in the AFDC-UF program, effective July 1, 1977. L. 1977, c. 127." And it is uncontested that Super Tires employees actually received benefits under this program during the May-June 1971 strike, and that the merits of this issue were fully briefed by all parties in the courts below. Here, where no factual issue remains and where the merits of eligi-

bility of this question have been properly presented below and remain at issue because of renewed participation in the AFDC-UF program, the erroneous mootness ruling of the Third Circuit can not be permitted to defeat review because the Court can properly resolve the fundamental eligibility question by reference to legislative history without remand. *Ohio Bureau of Employment Services* v. *Hodory*, —— U.S. ——, 97 S.Ct. 1898, 1905 (1977). Moreover, this case involves other state and federal welfare programs. It is uncontested that strikers obtained benefits under the federal-state AFDC program, as well as two New Jersey welfare programs. In these circumstances, the failure of the Court of Appeals to resolve one eligibility question with respect to the AFDC-UF program does not render this petition "inappropriate".[1]

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[1] Although Respondent Lloyd McCorkle does not specifically urge that the Court's summary ruling in *Kimbell, Inc.* v. *Employment Security Comm'n*, 429 U.S. 804 (1976) is dispositive of the federal labor law question presented in the instant petition, Respondent does recite (Br. 4) that the Court of Appeals considered it to foreclose such a challenge to New Jersey's *welfare* policy.

Accordingly, Super Tire wishes to call to the Court's attention a federal district court decision which, albeit involved different issues, concluded with respect to *unemployment compensation* eligibility for striking employees, that the *Kimbell* decision is limited to its particular facts. In *New York Tele. Co. et al.* v. *New York State Dept. of Labor*, —— F. Supp. —— (73 Civ. 4557) (S.D.N.Y. May 23, 1977) Judge Owen concluded (sl. op. pp. 34-36):

> On independent and careful consideration of the record and numerous briefs before the Supreme Court in *Kimbell*, I am compelled to conclude that the Court merely determined that the New Mexico compensation provisions, as a matter of *fact*, do not come into conflict with Federal labor law policy. I note that while the lower court in New Mexico found federal preemption, the reversal by the New Mexico Supreme Court was a summary reversal citing its prior decision, *Albuquerque-Phoenix Express*, which dealt entirely with state issues—construction of the relevant New Mexico statutes. I further note

(cont.)

II. LEGISLATIVE SILENCE DOES NOT CONSTITUTE CONGRESSIONAL APPROVAL OF FEDERAL-STATE WELFARE PAYMENTS TO EMPLOYERS ON STRIKE

Respondent Lloyd McCorkle's legislative history argument that Congress did not intend to disqualify

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that the Attorney General of New Mexico moved to dismiss the appeal in the Supreme Court on the ground that the question presented to the Court "does not raise a substantial federal question of preemption sufficient for this Court to take jurisdiction." New Mexico's brief in support of that proposition is illuminating:

> ". . . the New Mexico law, like a majority of the States' laws, does not provide for payment of benefits to strikers after a fixed period of disqualification. The general rule under New Mexico law is that claimants are disqualified from receipt of benefits for the duration of their unemployment resulting from a labor dispute which causes a substantial stoppage of work at their place of employment. As indicated in the record, the Employment Security Commission of New Mexico has allowed payment of unemployment compensation benefits to strikers in only three cases in its history, including the two cases discussed in this appeal, and only under facts similar to those present in this case where there has been no appreciable impact from the strike on the employers' continued business operations. In contrast to the Rhode Island law [sic], the interpretation by the New Mexico Supreme Court of the New Mexico unemployment compensation statutes provides no fixed or definite policy of payment of benefits to strikers, nor allows any expectations of such payment upon which employees could reasonably predicate labor dispute strategy. In fact, the interpretation by the New Mexico Supreme Court as to when benefit payments to strikers might be authorized runs directly counter to the employees strike objectives which is to impose as substantial an impact on the employers' business operations as possible to increase his economic burden and persuade him to a satisfactory settlement. To the extent this avowed strike strategy is realized, the eligibility of striking employees for benefits is defeated.
>
> "It is apparent, therefore, that neither the statistical (cont.)

strikers from eligibility under the AFDC and AFDC-UF programs is not based upon one single instance of affirmative documentation in any legislative materials. Rather, this argument is premised upon the failure of Congress to proscribe specifically such eligibility. However, this very premise has been nullified in *Burns* v. *Alcala*, 420 U.S. 575, 580-84 (1975), where the Court held that Congressional silence is *not* the equivalent of an affirmative indication of eligibiilty because "Congress has not undertaken to provide support for all needy children. . . ." *Id.* at 582-83 n. 9. Moreover, as we show below, Congress has not enacted a specific prohibition of strikers participation in welfare programs because these programs *prima facie* exclude strikers.

Respondent urges (Br. 6-7) that the failure of Congress to prohibit welfare payments to strikers in either the original Social Security Act of 1935 or the Wagner Act of 1935, or the Unemployment Compensation Act

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> history of payment of benefits to strikers nor the inconsistency between strike objectives and eligibility for benefits is likely to make the administration of the New Mexico unemployment compensation law a factor in labor dispute negotiations or to interfere with federal labor policy. The case on appeal here as well as the *Albuquerque-Phoenix Express* case illustrates this point. In neither case did the Employment Security Commission ever reach a decision on the eligibility of the claimants for benefits until the labor dispute was settled between the parties and a new contract agreement signed."

Obviously, the factual and legal position of the Attorney General of New Mexico would be a sound and compelling basis for the Supreme Court's dismissal on the merits. I find this to be the basis for the ruling and conclude that *Kimbell* is at the very least inapplicable and does not preclude me from reaching the issues in this case on the merits.

of 1935 means Congress intended at least optional eligibility at the election of the states. However, these legislative enactments were all addressed to different evils and do not on the whole or in part signal Congresional approval of state or federal welfare payments to strikers.

Title IV of the Social Security Act created the AFDC program and was limited on its face to children who became needy because of the death, absence, or incapacity of a parent. 42 U.S.C. § 606(a). "AFDC was not originally designed to assist children who are needly simply because the family breadwinner is unable to find work. . . ." *Batterton* v. *Francis,* —— U.S. ——, sl.op. p. 2. "At present needy families in which need is occasioned by unemployment are not eligible for any type of 'federal' assistance. . . ." S.Rep. No. 165, 87th Cong., 1st Sess. 1 (1961). Because this program was not intended to apply to any employable breadwinner, it was wholly unnecessary for Congress to prohibit payments to striking employees. Thus, the failure of Congress to enact such a prohibition prior to 1961 is irrelevant.[2]

Other provisions of the 1935 Social Security Act were directed at alleviating the widespread unemployment caused by the Great Depression. Unemployment benefits were not to go to striking employees but to those "who are thrown out of work suddenly." Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess. 214 (1935). This limitation was specifically reflected in the draft

[2] There is no indication that receipt, if any, of welfare benefits by strikers in pre-1935 federal programs was intended by Congress. In the chaos of the Great Depression, payments may have gone to striking employees by administrative oversight.

bills issued by the Social Security Board which expressly included a labor dispute disqualification for employees whose work stoppage (strike) occurred during a labor dispute. Indeed, the states could even disqualify employees temporarily laid off as a result of a strike at a separate employer's facility in order to insure that adequate funds would be available to aid those who had their contract of employment totally severed by recessionary business cycles. See *Ohio Bureau of Employment Services* v. *Hodory,* —— U.S. ——, 97 S.Ct. 1898 (1977). Similarly, it was obvious that *unemployment* compensation should not be paid to persons however "innocent" who were not unemployed. Otherwise states would risk depletion of unemployment funds and create expectations in out of work persons which could not be met.

Of course the Wagner Act was passed in 1935 to protect the public right of *employed* workers to strike and thus to use self-help to achieve improved terms and conditions of employment. And Congress insured that striking employees would not concurrently forfeit their job by preserving their employment relationship with the struck employer. 29 U.S.C. §§ 152(3), 163. Since such workers remained employed by specific legislative mandate, it was hardly necessary to expressly prohibit payment of AFDC welfare benefits created "to allow widows and divorced mothers to care for their children at home without having to go to work, thus eliminating the practice of removing needy children in situations of that kind to institutions." *Batterton* v. *Francis,* —— U.S. ——, sl.op. p. 2.

Lloyd McCorkle next urges (Br. 7-8) that the creation of the AFDC-UF program was an "obvious occasion for Congress to address the subject of welfare

benefits for strikers. . ." But as this Court stated in *Batterton* v. *Francis supra,* p. 4, this program was aimed at the involuntarily unemployed, specifically, those breadwinners who had their contract of employment severed by the 1959-60 economic recession. 107 Cong. Rec. 1677, 1679 (1961) (Message of Pres. Kennedy). Since striking employees retain their job rights, it is far from obvious that a welfare program aimed at the unemployed father should also contain a specific prohiibtion of striker eligibiilty. It is likewise incongruous to argue as does Respondent McCorkle (Br. 8) that the absence of such prohibition when Congress added the WIN provisions to the AFDC program in 1967 is an affirmative indication of Congressional approval of striker eligibility. This amendment provided work training programs to assist unemployable persons "acquire a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society. . . ." 42 U.S.C. § 630 (1970). Since striking employees are in fact wage-earning members of society, and recognized as such even by the Dept. of Labor, it is not surprising no express prohibition appears in the legislation. And as we have urged in the Petition (p. 17 n. 18), post 1972 efforts to enact a striker disqualification more reasonably constitute clarification of original legislative intent, rather than affirmative approval by negative action.[4]

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[3] Workers involved in labor disputes are classified as "employed persons" for purposes of unemployment figures. Handbook of Labor Statistics 1-2 (1970).

[4] McCorkle's argument (Br. 8-9) notwithstanding, deletion of an express prohibition before passage of the 1972 welfare amendments does not create a "common understanding" of affirmative eligibility. The Senate did not consider this question because a majority

Finally, Respondent McCorkle argues (Br. 6, 9) that because Congress has provided strikers' benefits under the Railroad Unemployment Insurance Act (45 U.S.C. § 354(a-2)(iii)) and apparently under the Food Stamp Act, it can be fairly claimed that Congress has indicated that strikers should be treated the same as non-strikers in all federal-state welfare programs. But these specific enactments indicate that when Congress has intended eligibility for striking employees, it has done so expressly. Moreover, no analogy in favor of broad welfare eligibility from these unique and limited statutes can be persuasively drawn. In 1938 Congress removed railroad workers from the state unemployment compensation provisions of the Social Security Act and placed them under specific federal coverage. Under this federal insurance system unemployment compensation is authorized only if a railroad strike is not contrary to the Railway Labor Act[5] or local union rules. This legislative change was made to create an incentive for railroad workers to support the peaceful resolution of labor disputes and to discourage resort to "wildcat" strikes in an industry vital to the public interest. *Bhd. of Railway Clerks* v. *Railroad Retirement Bd.,* 239 F.2d 37, 42-3 (D.C. Cir. 1956). This legislative judgment reflects the underlying premise of this case that economic factors directly influence the decision to strike. In any event this legislative change limited to railroad workers did not signal a general congressional design or desire to create welfare compensation for striking workers in other industries.

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of Senators believed this eligibility question should be first considered by the Senate Labor and Public Welfare Committee. 118 Cong. Rec. 33993 (1972) (Remarks of Sen. Williams).

[5] 44 Stat. 577 (17926), 45 U.S.C. §§ 151-163.

While Congress was willing to permit possible interruptions to interstate commerce in other segments of the economy subject to the jurisdiction of the National Labor Relations Board, the Railway Labor Act is designed through direct federal intrusion into labor disputes by way of binding arbitration (45 U.S.C. §§ 157, 158(a)) and emergency no strike provisions (45 U.S.C. § 161) to protect interstate commerce from the loss of essential transportation services. *Texas & N. O. R.R.* v. *Bhd. of Railway Clerks,* 281 U.S. 548, 564-66 (1930). Indeed, unlike the private sector where economic power in the form of the strike and lockout determine the content of collective agreements, under the Railway Labor Act "minor disputes" are subjected to compulsory arbitration and strikes over such issues are enjoinable by federal courts. *Bhd. of Trainmen* v. *Chicago River & I.R.R.,* 353 U.S. 30 (1957). Thus, there can be no basis for inferring from this legislation that Congress believed direct state created availability of welfare compensation for striking employees in the unregulated sectors of industry would be a permissible restructuring of an existing balance of economic power between labor and management during collective bargaining. Indeed, the lower courts have been cautioned against drawing analogies from this legislation. "Both its history and the interests it governs show the Railway Labor Act to be unique." *Whitehouse* v. *Illinois Cent. R.R.,* 349 U.S. 366, 371 (1955). See also *New York Tele. Co.* v. *New York State Dept. of Labor,* — F.Supp. —, sl. op. 29-30.

Similarly, the Food Stamp Act of 1964 was designed to provide eligible households "an opportunity to obtain a nutritionally adequate diet." 7 U.S.C. § 2013(a), and the provision of the Act cited by Respondents

(7 U.S.C. § 2014(c)) was enacted to preserve federal neutrality in labor disputes by not requiring unemployed food stamp recipients to become strike breakers in order to *maintain* eligibility. This language was not directed to initial eligibiilty of striking employees. The House Agricultural Committee's report specifically refers to eligibility "to those who, *through no fault of their own,* need food stamp assistance." H.R. Rept. No. 91-1402, 91st Cong., 2nd Sess. 10 (1970). At most then, families who have previously qualified for food stamp benefits do not forfeit them by participating in a strike. It is at least an overstatement to read into these two statutes Congressional approval of direct financial aid to workers in the private sector whose sole "need" for welfare payments arises from their own election to strike their employer to obtain higher wages and benefits.

CONCLUSION

For the reasons stated above as well as those presented in the Petition, the writ of ceritorari should be granted.

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